

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
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DATE FILED: 7/11/2017

JAMES DALY,

Plaintiff,

-v-

CITY OF NEW YORK and JOSEPH PONTE, et al.

Defendants.

16 Civ. 6521 (PAE) (JCF)

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

*Pro se* plaintiff James Daly brings this action under 42 U.S.C. § 1983 alleging that the mattress he was issued while incarcerated caused him severe pain. Before the Court is the May 30, 2017 Report and Recommendation of the Hon. James C. Francis, United States Magistrate Judge, recommending that the Court dismiss this action without prejudice to Daly's ability to amend his complaint. Dkt. 17 ("Report"). For the following reasons, the Court adopts this recommendation.

**I. Background**

The Court incorporates by reference the summary of the facts provided in the Report. *See* Report at 2.

On August 17, 2016, Daly filed a Complaint. Dkt. 2. On October 7, 2016, the Court accepted this case as related. On December 20, 2016, defendants moved to dismiss Daly's Complaint, Dkt. 11, and filed a memorandum of law in support, Dkt. 12. On March 3, 2017, the Court referred this case to Judge Francis for general pretrial supervision and for a report and recommendation. Dkt. 15.

On May 30, 2017, Judge Francis issued the Report, recommending that the Court dismiss the Complaint without prejudice. Objections were due by June 13, 2017. *See* Report at 13. To date, the Court has received no objections.

## **II. Discussion**

In reviewing a Report and Recommendation, a district court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). “To accept those portions of the report to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record.” *Ruiz v. Citibank, N.A.*, No. 10 Civ. 5950 (KPF), 2014 WL 4635575, at \*2 (S.D.N.Y. Aug. 19, 2014) (quoting *King v. Greiner*, No. 02 Civ. 5810 (DLC), 2009 WL 2001439, at \*4 (S.D.N.Y. July 8, 2009)); *see also, e.g., Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

As neither party has submitted objections to the Report, review for clear error is appropriate. Because the Report explicitly states that “[f]ailure to file timely objections will preclude appellate review,” Report at 13, both parties’ failure to object operates as a waiver of appellate review. *See Caidor v. Onondaga Cty.*, 517 F.3d 601, 604 (2d Cir. 2008) (citing *Small v. Sec’y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam)).

Careful review of Judge Francis’s thorough and well-reasoned Report reveals no facial error in its conclusions; the Report is therefore adopted in its entirety. As Daly has not yet had the opportunity to amend his Complaint, the Court agrees with Judge Francis that this dismissal shall be without prejudice to Daly’s ability to file an amended complaint, responsive to the arguments set forth in defendants’ motion to dismiss.

### CONCLUSION

For the foregoing reasons, the Court dismisses Daly's Complaint without prejudice. The Clerk of Court is directed to terminate the motion pending at docket number 11.

The Court directs the Clerk to mail a copy of this decision to plaintiff at the address on file.

SO ORDERED.

A handwritten signature in cursive script, reading "Paul A. Engelmayer".

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Paul A. Engelmayer  
United States District Judge

Dated: July 11, 2017  
New York, New York